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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems	)	**WT Docket No. 96-18**
Implementation of Section 309(j) of the Communications Act-- Competitive Bidding	)	**PP Docket No. 93-253**

To: The Commission

PETITION FOR RECONSIDERATION

PageMart II, Inc. ("PageMart"), submits this its Petition for Reconsideration ("Petition") as provided for in §1.106 of the Commission's Rules with respect to the First Report and Order, WT Docket No. 96-18, PP Docket No. 93-253, FCC 96-183, released April 23, 1996, ("First R & O") in the above captioned proceeding. The First R & O was published in the Federal Register on May 10, 1996, 61 Fed. Reg. 21380. Accordingly, this Petition is timely filed pursuant to §1.4 of the Commission's Rules.

In support of this Petition, the following is respectfully shown:

INTRODUCTION

1. PageMart seeks reconsideration of the First R & O to make clear that PageMart's frequency 929.7625 MHz qualifies as a nationwide exclusive PCP frequency

as of February 8, 1996 and accordingly entitles it to benefits of a nationwide PCP licensee and exempts it from the modified freeze and from the geographic licensing.

2. It is PageMart's position that the First R & O erred in failing to extend exclusivity consideration to PageMart and other similarly situated parties for the purposes of the interim processing procedures outlined in the Commission's First R & O. Exclusivity should have been extended to all entities that had completed as of February 8, 1996 exclusivity coordination with PCIA and, as a result of the PCIA coordination, had filed the requisite number of applications with the FCC to perfect the exclusivity claim as of that date. PageMart and other similarly situated entities should have then been identified on the PCP nationwide exclusivity frequency Public Notice, DA 96-748, released May 10, 1996. 1/

3. In summary, immediate reconsideration of the First R & O in order to avoid irreparable harm to PageMart is required for the following reasons:

- The Commission improperly failed to consider arguments raised by PageMart and others in interim comments and interim reply comments with respect to the interim licensing proposal proposed in the Notice of Proposed Rulemaking, WT Docket No. 96-18, PP Docket No. 93-253, FCC 96-52, released February 9, 1996 (hereinafter "NPRM"). The Commission failed to clarify and extend to PageMart exclusivity status for 929.7625 MHz despite the fact that PageMart had filed applications for 429 sites in February of 1994; PageMart had completed PCIA coordination; the frequency was designated for exclusivity treatment by PCIA; and the Commission began granting PageMart's 929.7625 MHz applications in December of 1994. PageMart had proceeded with the implementation of what it believed to be its legitimate claim for exclusivity on 929.7625 MHz.

1/ Notwithstanding the Public Notice date of May 10, 1996, this document was not released to the Public until May 13, 1996.

• Thus, the First R & O's failure to consider and extend to PageMart and other similarly situated entities nationwide exclusivity, exempt from the modified freeze and excluded from geographic licensing, constituted a de facto modification of PageMart's authorizations on 929.7625 MHz and violated fundamental principles of due process, and is an impermissible taking.

• The failure to address in the First R & O PageMart's claim to exclusivity on 929.7625 MHz under the circumstances identified also resulted in disparate treatment among similarly situated licensees of nationwide exclusive CCP and PCP channels.

4. Even though the Commission in its First R & O, Note 8, stated that "our records indicate that Private Carrier licensees have met our requirements for nationwide exclusivity on 19 channels in the 929 MHz band," PageMart's claim to nationwide exclusivity on 929.7625 MHz was not listed on the Commission's PCP nationwide exclusive frequency Public Notice released May 13, 1996. Since PageMart's claims were not addressed in the First R & O nor was its claim to exclusivity on 929.7625 MHz recognized in the PCP Nationwide Exclusivity Public Notice, it must be concluded that PageMart is not entitled to nationwide exclusivity on 929.7625 MHz. Accordingly, PageMart, with respect to 929.7625 MHz, is subject to the modified freeze and the frequency will be subject to geographic licensing.

5. However, exclusivity should have been extended to PageMart and other similarly situated entities, and the First R & O and the exclusivity Public Notice should have made that designation clear. To have done otherwise prejudices PageMart who had relied upon the existing regulatory scheme to plan its business with respect to 929.7625 MHz to meet the ever increasing need for paging service. Further, extension of exclusivity for processing considerations under the interim rules to PageMart and this limited category of entities could not increase any potential for fraud. To the contrary, it is submitted that to do otherwise would provide opportunity for mischief by permitting unscrupulous promoters to file mutually exclusive applications in and around PageMart's

core system on 929.7625 MHz. In addition, it also permits incumbent licensees who previously were prohibited from expanding to file additional applications to expand their networks at PageMart's expense. PageMart has already constructed 364 sites on this frequency in reliance upon its claim to exclusivity. Thus, PageMart has demonstrated its bona fideness in having made an investment based upon its reliance on the Commission's exclusivity standards. Accordingly, the Commission must reconsider the First R & O to ensure that PageMart has an opportunity to protect that investment, build-out its system on 929.7625 MHz, pursuant to the protections extended under its claim of nationwide exclusivity to ensure competitive paging services to the public.

PAGEMART REASONABLY RELIED ON EXISTING EXCLUSIVITY PROCEDURES

6. On February 21, 1994, PageMart filed for 309 sites for a nationwide frequency with PCIA's predecessor NABER. Over the course of the next month, PageMart filed additional applications eventually totaling 429 sites. On March 15, 1994, PageMart requested nationwide exclusivity to accompany the previously filed applications which were received by PCIA. During the first week of May, 1994, PCIA coordinators began work on PageMart's applications and eventually determined that PageMart could be coordinated on 929.7625 MHz since there were only a handful of exclusive local systems already on the channel. PageMart's applications were then filed in May, 1994 with the FCC as coordinated on 929.7625 MHz.

7. On May 27, 1994, the FCC released Public Notice, DA 94-546 which listed those licensees who qualified for local, regional and nationwide exclusivity. In that Public Notice, the Commission stated that the list did not include pending requests or petitions for waivers of the exclusivity rules; however, the Commission did state that these would be addressed separately.

8. On PCIA's 929 Exclusivity Master List of December 1, 1994, PageMart was shown as having been coordinated for 929.7625 MHz. The Commission began granting licenses on that frequency to PageMart in December, 1994. In January, 1995, PageMart requested extended implementation for 929.7625 MHz and a waiver of Section 90.496(a-c) requiring the posting of a bond, on the basis that the it had shown its bona fideness by already constructing two nationwide systems, but that 929.7625 MHz required special analysis due to the fact that it was not exclusive through-out the whole nation. It further cited its pending request for exclusivity and a pending Petition to Dismiss 929 MHz Exclusivity Request as a basis for the tolling of construction deadlines. It also cited Commission precedent for the tolling of construction deadlines for 929 MHz nationwide licenses. Despite that request, PageMart continued to construct its facilities, never jeopardizing any licenses by allowing them to expire, and on May 17, 1996, submitted to David L. Furth, Chief of the Commercial Wireless Division, an inventory of 364 constructed and operating facilities on the referenced frequency.

FAILURE TO RECOGNIZE PAGEMART'S CLAIM TO EXCLUSIVITY VIOLATION OF PRINCIPLES OF DUE PROCESS

9. In the NPRM, at paragraph 26, the Commission asserts that all PCP channels for which licensees have met the construction requirements for nationwide exclusivity as of the date of the NPRM are excluded from geographic licensing.

10. It appears to be the Commission's position that it can change its rules without notice to those who may be harmed by the retroactive effect of such changes. However, courts have always looked for justifiable rationale for adoption of rules which resulted in harm to an applicant. See United States v. Storer Broadcasting Co., 351 U.S. 192, 193 (1956). See also, Hispanic Information and Telecommunications Network vs. FCC, 865 F.2d 1289, 1295 (D.C. Cir. 1989). In the present case, the Commission has not come forth with any sufficient rationale for it to change its rules retroactively. The

Commission is merely saying that 929 MHz exclusivity, which it had only recently set in place, has now been eliminated. As the Court of Appeals in Mobile Communications Corporation of America, et al. v. FCC, No. 93-1518 (D.C. Cir. March 8, 1996), pointed out, the Commission must engage in reasoned decision-making in its decisions. The Commission, according to the Court, must address such questions as to whether its new position is consistent with the reliance interests of those affected by its decision. In the present case, the Commission paid no heed to those licensees with pending requests who had met the requirements for nationwide exclusivity, who had been lulled into a false sense of security by the Commission's inaction and promises to release a second exclusivity list and further, who had invested substantial capital in the build-out.

11. In the present case, the Commission says nothing at all about the retroactive application of its proposed Rules. Yet by eliminating its Rules for exclusivity, it has applied its new standard to matters pending under the old rules. Landgraf vs. Film Products, 114 S.Ct. 1483, 1499 (1994) states that where a statute "would impair rights a party possessed when he acted, increase his liability for past conduct, or impose new duties with respect to transactions already completed," that is "genuinely retroactivity." 114 S.Ct. 1487. Here, the Commission cuts off the rights of an applicant with a pending request before the Commission, who had relied on the Commission to at least give it notice, and who now finds itself hopelessly cut off without so much as a grace period to salvage the time and resources it has committed to the project of nationwide exclusivity. PageMart submits that, under Landgraf, the proposed 929 MHz application processing must be classified as retroactive.

12. Further, in Bowen v. Georgetown University Hospital, 488 U.S. 204, 209 (1988), the Court stressed that "Retroactivity is not favored in the law" and stated that there must be *substantial justification* for retroactive rulemaking authority. Thus, it becomes a balancing test. See Retail, Wholesale, and Department Store Union v. NLRB, 466 F.2d 380, 389-390 (D.C. Cir. 1972) ("Retail Union") and Maxcell Telecom Plus, Inc.

v. FCC, 815 F.2d 1551, 1554-55 (D.C. Cir. 1987), where the D.C. Circuit enumerated the considerations in the resolution of the dilemma of whether the inequity of retroactive application is counterbalanced by significant interest. These considerations are: a) whether the case is one of first impression; b) whether the new rule represents an abrupt departure from well established practice or attempts to fill a void; c) the extent to which the party hurt by the new rule relied on the former rule; d) the degree of burden the retroactive order imposes; and e) the statutory interest in applying a new rule despite the reliance on the old standard. Retail Union , Supra at 390. Here, a) the 929 MHz nationwide exclusivity is not a case of first impression; b) the processing procedures are a dramatic departure from existing procedures in that now, the applicant is out of luck, without any notice, that on February 8, 1996, its supposed nationwide exclusivity was lost; c) the applicants relied on the Commission to at least address the issues in its petitions or in any event to allow them the chance to complete nationwide build-out; d) a substantial burden rests on the unsuspecting applicants whose requests had been pending for at least a year without a clue as to the disastrous fate the Commission was to impose; and e) there is no statutory interest in applying the new rules promulgated by the Commission, except that the Commission could gain money for the national treasury. However, auctions were never intended solely for the goal of raising money, at the expense of the public interest. In the latter regard, the Commission states only that effective February 8, 1996, those with pending matters in the exclusivity area are without rights.

13. In Landgraf, supra at 1497 the Court reiterates as it did in Bowen that the presumption is against statutory retroactively which is founded upon "elementary consideration of fairness" dictating that "individuals should have an opportunity to know what the law is and to conform their conduct accordingly." The Court states in Landgraf that this presumption against statutory retroactively is deeply rooted in the Supreme

Court's jurisprudence and "finds expression in several constitutional provisions." See also Chemical Waste Management, Inc. vs. EPA, 869 F.2d 1526, 1536 (D.C. Cir. 1989).

14. Because the Commission does not -- and cannot -- state a sufficient underlying substantial purpose, a public interest rationale, for its new procedural rules, to balance the inequities to the applicants, it cannot impose them on pending requests.

15. A fundamental requirement of an administrative agency is to provide notice to those affected by its rules. Notice is an administrative *necessity* required by the Administrative Procedure Act ("APA"), 5 U.S.C. Section 552(a)(1)(B). A person affected by FCC actions must have actual and timely notice and no administrative action taken without such notice can be allowed to stand against a person who is adversely affected. See Northern California Power Agency v. Morton, 396 F. Supp. 1187, aff'd 539 F. 2d 243 (D.C. Cir. 1975). Where there has been reliance on an existing regulatory scheme, any change in the scheme must provide a reasonable opportunity for those caught in the change to conform. PageMart submits that to severely affect a licensee's rights without such notice, constitutes an impermissible taking.

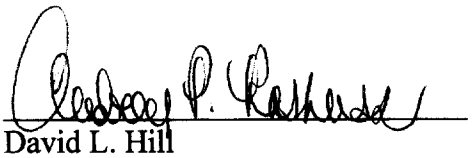
CONCLUSION

For all of the reasons specified above, PageMart respectfully submits that the Commission immediately reconsider its First R & O, its PCP Nationwide Exclusivity Public Notice and its interim procedures to make it clear that PageMart and other similarly situated entities had reasonably relied upon the then existing procedures; had obtained PCIA coordination for exclusive frequency; and had begun implementing nationwide build-out upon the then existing procedures are entitled to exclusivity treatment, thereby exempting PageMart's 929.7625 MHz from the modified freeze and

ultimately from consideration for geographic licensing. Equity and traditional concepts of due process demand this result.

Respectfully Submitted,

PAGEMART II, INC.



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CERTIFICATE OF SERVICE

I, Gladys L. Nichols, do hereby certify that on this 5th day of June, 1996, the foregoing **PETITION FOR RECONSIDERATION** was served to the following persons by first-class mail:

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